



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.186 OF 2013

ELIAS JOSEPH WABURI WAMUNYUPLAINTIFF

VERSUS

JOSEPH MWANGI NJOROGEDEFENDANT

JUDGMENT

(Suit by the plaintiff seeking to be declared owner of certain land; plaintiff having purchased 20 acres of land and having a decree for the same; defendant also having purchased 4 acres from the same seller and having a decree for the same; defendant moving to execute decree and subdividing the seller's land to create his portion of 4 acres and the other for the seller; plaintiff purporting to also execute his decree; effect is that two separate registers opened and two maps created; from the evidence, the proper title is that of the defendant as it was created earlier in time; plaintiff's title found to be backdated and map also fraudulently amended to accommodate him; defendant's title upheld and plaintiff's title cancelled; land officials ordered to effect amendments to the registers and maps to give effect to the judgment)

(a) Introduction and Pleadings.

1. This suit was commenced by way of a plaint filed in the year 2010. In the suit, the plaintiff has asked for the following orders :-

(a) A declaration that he is the sole absolute and indefeasible proprietor of the land parcel Nyandarua/Mawingo/764 comprising of 8.1 Ha.

(b) A declaration that the defendant is a trespasser on LR No. Nyandarua/Mawingo/764.

(c) A declaration that the land comprised in title No. Nyandarua/Mawingo/725 is part of Nyandarua/Mawingo/764 and that the title to Nyandarua/Mawingo/725 be cancelled.

(d) An order of eviction and ejection of the defendant from the land parcel Nyandarua/Mawingo/764 and a permanent injunction restraining the defendant, from interfering with the said piece of land or any part thereof.

(e) Costs of the suit and interest.

2. The defendant filed a defence and counterclaim. In his defence, he pleaded pleaded inter alia that the plaintiff could not have obtained a valid title deed to the land parcel Nyandarua/Mawingo/764 as a

subdivision of the land parcel Nyandarua/Mawingo/90, and that if such was issued, the same was obtained fraudulently and illegally. The following particulars of fraud are pleaded against the plaintiff :-

(a) Colluding with officers from the Land Registry at Nyandarua to create other records for Nyandarua/Mawingo/90.

(b) Purporting to cause subdivision of Nyandarua/Mawingo/90 when the said title was already encumbered by an order of injunction in Nyahururu PMCC No. 186 of 1993 and restriction orders.

(c) Colluding with Land Registry officers to delete the register without a court order and or authority.

(d) Altering and cancelling the registration, subdivision and numbers Nyandarua/Mawingo/724 and 725 and illegally inserting thereof Nyandarua/Mawingo/764.

3. He has pleaded that the land parcel Nyandarua/Mawingo/725 is a distinct and separate land parcel belonging exclusively to him. He has asserted that he is lawfully in land belonging to him and is not in occupation of any portion of the plaintiff's land. In the alternative, he has pleaded that if he is in occupation of 4 acres of the plaintiff's land parcel Nyandarua/Mawingo/764, then he has acquired title to the same by way of adverse possession, for the reason that he has been in exclusive uninterrupted possession of the land since the year 1987.

4. In the counterclaim, he has asked for the following orders (which I have slightly paraphrased for brevity):-

(a) A declaration that he is the sole and absolute proprietor of the land parcel Nyandarua/Mawingo/725 measuring 4 acres or thereabouts and a permanent injunction to issue restraining the plaintiff from interfering with the same.

(b) Alternatively and without prejudice a declaration that he is the absolute proprietor of 4 acres out of the land parcel Nyandarua/Mawingo/764 by way of adverse possession and a title deed to be issued to him in respect of this portion of 4 acres.

(c) Costs of the suit plus interest.

(d) Any other or further relief that this Honourable Court may deem fit and just to grant.

5. The plaintiff filed a reply to defence and defence to counterclaim. Inter alia, he denied that the defendant has been in exclusive possession of 4 acres of land within his 20 acres. He has pleaded that the land parcel Nyandarua/Mawingo/725 is not registered in the Nyandarua District Land Registry, and if it is, it does not include any part of the plaintiff's land parcel Nyandarua/Mawingo/764. He has refuted all allegations of fraud and has averred that he acquired the land parcel Nyandarua/Mawingo/764 as a bona fide purchaser for value from the original owner. He has pleaded that it is impossible for the land parcel Nyandarua/Mawingo/725 to be within his land parcel Nyandarua/Mawingo/764 and has pleaded that he is entitled to exclusive possession of his land. He has denied that the defendant has acquired 4 acres of his land by way of adverse possession. He has pleaded that the plaintiff's counterclaim is res judicata and that the defendant is not entitled to rely on the case Nyahururu PMCC No. 186 of 1993 against him. He has pleaded that if he has any claim, he should direct the same to Mr. Munywe, the person who sold to him the said land. He has asked that the defence and the counterclaim be dismissed with costs.

6. I need to mention that while the case was ongoing, the defendant died and he was substituted with his son, Alexander Njoroge Mwangi. However, my reference to the word "defendant", means the original defendant. Upon his death, the family of the defendant wished to bury him on the 4 acres of land in dispute, which led to another case being filed, that is Nakuru ELC No. 138 of 2017, being a case to stop the burial of the defendant on the disputed land. I ordered that case be stayed to await the outcome of this suit, for if I am to hold for the plaintiff, then there would be no basis to bury the body of the defendant on

the disputed land, and conversely, if I am to hold for the defendant, the plaintiff would have no basis to stop the burial of the defendant on the disputed land.

(b) Evidence of the Plaintiff

7. The gist of the plaintiff's case is that sometimes in the year 1982, he purchased from one Simon Njoroge Munywe 20 acres out of the land parcel Nyandarua/Mawingo/90. At the time of purchase, this land was still under a loan from the Settlement Fund Trustees. He was not the only purchaser of this land. There were other purchasers including the defendant. However, Mr. Munywe sold more land than he had, and he had to call a meeting of all purchasers, where it was agreed that he would only transfer land to those who had obtained consent of the Land Control Board. The position of the plaintiff is that the defendant was one of the purchasers who were to be refunded their money and he therefore did not get any land from Mr. Munywe. On 5 September 1986, he wrote an agreement with Mr. Munywe which agreement showed that he had purchased 20 acres where there was situated a house. He did not get a transfer for his 20 acres and he sued Mr. Munywe in the case Nairobi SRMCC No. 633 of 1990 and a decree was issued in his favour. According to the plaintiff, the order of the court which gave him 20 acres was effected and he obtained title to the land parcel Nyandarua/Mawingo/764 on 31 March 1994. The other portion of the subdivision was registered as Nyandarua/Mawingo/761 under Mr. Munywe. There was however a caution placed by the defendant which was removed by the Land Registrar after notice. He was not aware of the case Nyahururu PMCC No. 86 of 1993 filed by the defendant against Mr. Munywe through which the defendant had also obtained a decree for 4 acres of land. In the year 1994, the plaintiff complained of the defendant's trespass on his land, and the District Officer wrote to the defendant a letter dated 18 October 1994 summoning him but he failed to appear and continued his trespass. Another letter to the defendant was written on 5 March 2001 by the District Land Registrar, asking the defendant to vacate, but he did not do so. In the year 2005, he filed the case Naivasha PMCC No. 892 of 2005 against the defendant but the court did not have jurisdiction and the case was withdrawn. He testified that the Green Card to his land went missing and in the year 2006, he wrote to the Land Registrar who directed a reconstruction. He testified that the defendant was also summoned by the Land Registrar on 4 September 2008, but he did not appear. He stated that the Land Registrar directed that there be no developments on the land until the dispute is sorted but the dispute has never been resolved. He testified that the land which the defendant occupies is within his portion and that the defendant has developed it.

8. In cross-examination, the plaintiff testified that the defendant occupied the house noted in the agreement of 5 September 1986 as a tenant of Mr. Munywe. He affirmed that the defendant started occupying the 4 acres in dispute in the year 1987 and that he (the defendant) fenced it, built a structure on it and used it for farming. He testified that it was agreed in a meeting held in the year 1989, that the defendant would be refunded his money. He could not explain how the land parcel No. 90 was subdivided into the land parcels No. 761 and 764 without there being other registration numbers in between. He testified that he is the one who presented the mutation form. He did not have the payment receipt nor the payment receipt for when he was issued with a title deed although he did state that he paid some money. He also could not explain a letter of the Land Registrar dated 4 September 2008, which stated that there have been two subdivisions of the land parcel No. 90, one with the numbers 724 and 725 and another with the numbers 761 to 764. He testified that they had a criminal case with the defendant where the defendant was charged in the year 2005 for cutting the plaintiff's trees but he was eventually acquitted. He was not aware of the case Nyahururu No. 186 of 1993 where the defendant succeeded in his claim for 4 acres against Mr. Munywe. He was also not aware that the court signed another mutation form which was registered in the year 1993 through which the defendant obtained title to the land parcel No. 725. He was thus not aware that the defendant obtained his title following a court decree.

9. Simon Karanja Munywe, testified as PW-2. He testified that he was allocated the Plot No. 90 in Mawingo Settlement Scheme by the Settlement Fund Trustees (SFT) and he took possession of the land in the year 1962. He then built a permanent storey house. In the year 1982, he sold 20 acres to the plaintiff at a consideration of Kshs. 100,000/= which did not include the house. He entered into a separate agreement for the purchase of the house on 5 September 1986 and the plaintiff completed payment for both land and house. They had earlier proceeded to the Land Control Board and obtained a letter of

consent dated 20 August 1982. He identified the 20 acres that he sold to the plaintiff as the portion of land where the permanent house was located. He had earlier leased this house to one Samwel Njoroge Kinyanjui who was a teacher. Samwel vacated the house and he rented it to the defendant, who was also a teacher, in the year 1987. At that time, he stated that the plaintiff was not around and he could not have left the house vacant as it would have been vandalized and it is him (PW-2) who rented this house to the defendant and was the one receiving rent.

10. Apart from the plaintiff, he had 7 other purchasers including the defendant, who had purchased 4 acres of land in the year 1987 at a consideration of Kshs. 12,000/= per acre. He stated that what he sold to him was adjacent to the neighbouring land parcel No. 91 but the defendant said that he cannot go there and continued living in the old house until the plaintiff asked him to vacate, which he refused. He stated that he eventually vacated the house after being sued in a case in Nairobi and moved into a permanent house that he had built next to this old house owned by the plaintiff. He explained that he had been allocated 62 acres by the SFT but the land was actually only 52 acres. Out of his own volition, he organized a meeting with the purchasers where it was agreed that he would transfer land only to those who had obtained Land Control Board consents, and refund the other purchasers. He testified that the defendant and one Duncan Njoroge were the ones to be refunded. He refunded the latter, but they could not agree on a refund with the defendant for the reason that PW-2 wanted a set-off because the defendant owed him rent for 5 years. He stated that the defendant had paid him Kshs. 40,000/= for the land, but he was demanding rent of Kshs. 60,000/= and they could not agree. The defendant then sued him in Nyahururu Magistrate's Court in the case No. 286 of 1993 and judgment was entered against him ordering him to transfer 4 acres to the defendant after the defendant pays a balance of Kshs. 3,000/=. He averred that he has never been served with the judgment and has never been paid this amount of Kshs. 3,000/=. He stated that he was never called upon to show where this 4 acres should be situated. He did affirm that the plaintiff had sued him in Nairobi to transfer 20 acres to him and he testified that he complied with this order. For the other purchasers, he arranged for them to have titles and he has transferred the land to them. He testified that his land was subsequently subdivided into the parcels No. 761 and 764, one portion for himself, and the other for the plaintiff. He surrendered his original title for subdivision and the plaintiff got title to his portion of 20 acres on 30 March 1994. He was not aware that his original land parcel No. 90 had been subdivided into the parcels No. 724 and 725 and was not aware of how this was done. He only recognizes the subdivision giving rise to the parcel Nos. 761 and 764. He stated that he is yet to subdivide the parcel No. 761 and that the defendant should not occupy the plaintiff's land as he had shown him his portion. He does not recognize the title of the defendant.

11. In cross-examination, he did not refute having a sale agreement with the defendant for the sale of 4 acres of land out of the land parcel No. 90. He stated that he only had a verbal agreement to collect rent from the house that he had already sold to the plaintiff, but had nothing to show that he rented the house to the defendant. He agreed that the agreement that he held with the purchasers did not indicate who was to be refunded his money. He was aware of the case No. 186, where he was sued by the defendant, of which he never entered appearance nor defend. He stated that in the year 1993, the land had yet to be subdivided. He stated that he went with the plaintiff to the Land Control Board in the year 1994 so as to transfer the parcel No. 764 to the plaintiff and that he signed the transfer after the consent. He was not aware that the defendant obtained title to his land after the transfer documents were signed by the Court Executive Officer. He was not aware that a sum of Kshs. 3,000/= was deposited in court by the defendant pursuant to the decree where he had been sued.

12. PW-3 was Joshua Adel Nyabola. He is a Government surveyor attached to the Nyahururu station. He testified that the land parcel No. 725, which is 4 acres, is within the land parcel No. 764 which measures 20 acres. In arriving at this conclusion, he utilized a Registry Index Map (RIM) which he stated was the official map at the Nyahururu Land Registry and which he produced as an exhibit. In cross-examination, he affirmed that this 4 acre portion of land is fenced using barbed wire and has structures in it together with trees. He also affirmed that their office was in possession of a copy of the defendant's mutation form presented on 17 November 1993 which created the parcel numbers 724 and 725. He testified that there was a Registry Index Map (RIM) dated 13 July 2005 emanating from the Provincial Survey Office in Nyeri which bears the parcel numbers 724 and 725. He explained that up to the year 2007, the amendments of land maps were being done at the Provincial Survey Office in Nyeri, but after 2007, the

amendments are done at the District Survey Office in Nyahururu.

13. He pointed out that when a survey map is amended, the amendments are noted in the "legend" which is in chronological order. In this instance, the amendment No. 11 in the legend of the map from the Provincial Survey Office, showed that the land parcel No. 90 was amended on 12 July 2005, to create the land parcel Nos. 724 and 725. He did note that amendment No. 11 in the legend of the RIM from the Nyandarua District Land Office, showed a subdivision of the same land parcel No. 90, but now the land was being subdivided to create the land parcel Nos. 761 and 764. There were other entries thereafter, with the next entry, that is entry No. 12, bearing the date of 21 March 2006.

14. He testified that once the parcels No. 724 and 725 were created, ordinarily, if there was a further subdivision, the same will be out of these created parcel numbers. He testified that at times, Land Registrars request for amendment of maps and the particular amendment that created the parcels No. 761 and 764 was authorized by the Land Registrar who signed a mutation form on 10 August 2009, about 4 years after the 2005 amendment in the Provincial Survey Office map. He did note that the mutation form creating parcel No. 761 and 764 is dated 16 March 1994 although the instructions to amend were made on 10 August 2009. The effect of this instruction was to remove the land parcels No. 724 and 725. He also expounded that ordinarily, save where there are errors, parcel numbers are given in series after the last number in the scheme. He could not explain why the plaintiff's subdivision only bore the parcel numbers 761 and 764 and nothing in between.

15. He testified that the mutation form which created parcel No. 724 and 725 was presented on 17 November 1993 whereas the mutation form which created the land parcels No. 761 and 764 was presented on 31 March 1994. He stated that once the mutation is presented, there is a certain procedure which is followed before the RIM is amended. In this instance, the amendment that came first is that which created the parcel Nos. 724 and 725. He testified that the parcel No. 764 is intact, but the parcel No. 761 was further subdivided to create the land parcels No. 882 and 883.

16. He testified that there is a Receiving Book for mutations but what is in their office is old and torn and not easy to extract information. There before, these mutation forms used to be received in Nyeri Provincial Survey Office but when the documents were being transferred to the District Survey Office in Nyahururu, some of them got lost. He could not therefore confirm what entries are present for the year 1993. He indeed, despite being given time to do so, could not find the mutation forms. He admitted that they do not have a good system and there is also possibility of carelessness on the part of staff.

17. In re-examination, he did testify that the defendant's mutation form does not show the date it was received for registration as it does not have the Presentation Book number and no receipt number. It appeared that it was signed by the Court and therefore authority to subdivide was from the court. He compared with the mutation form presented by the plaintiff, which bore a presentation book No. 689 and the date 31 March 1994, as the date received for registration. He noted that the title deed issued to the plaintiff was issued on 30 March 1994. In his view this showed that due process was followed and the map amended. According to him, both mutations passed through the survey office, but the current RIM that they have in their office, shows the land parcels No. 761 and 764 and not the land parcels No. 724 and 725 meaning that the latter have titles not backed up by their maps.

18. PW-4 was Nathan Gioche Gathaiya, the Land Registrar of Nyahururu. He took over the office at Nyahururu in the year 2012 from the previous Land Registrar, Mr. Charles Birundu. He had the Title Abstract (commonly known as the "Green Card") to the parcel No. Nyandarua/Mawingo/90. He testified that this Green Card was opened on 29 December 1988 in the name of the Settlement Fund Trustees (SFT) with a registered area of 21.0 Ha. The SFT on 11 May 1989, transferred the land to Simon Njoroge Munywe (PW-2) and he was issued with a title deed on the same day. Entries No. 4 and 5 were cautions by one Samuel Njoroge Kinyanjui registered on 22 August 1989, and the other registered on 5 June 1990 by the defendant. Entry No. 6, dated 16 February 1994, withdrew the caution in Entry No. 4. Entry No. 7 was made on 21 February 1994 and is a restriction but the nature of the restriction is not indicated. Entry No. 8 is dated 31 March 1994 showing that the title was closed on subdivision to create the parcel Nos. 724 and 725. The Land Registrar noted a crossing out of these parcels No. 724 and 725, and new numbers

inserted in their place, showing the land parcels No. 761 and 764. He stated that he had no records for the land parcels No. 724 and 725 as there are no Green Cards for these. What he had were Green Cards for the land parcels No. 761 and 764. The first entry for the parcel No. 761 shows PW-2 as the registered proprietor. The second entry, made on 19 July 1994 shows a subdivision of this land into two portions, that is parcel Nos. 882 and 883. He stated that there are no cards for parcels No. 762 and 763 which should fall in between the parcel numbers 761 and 764.

19. He testified that the parcel No. 764 was opened on 31 March 1994, the first entry being that of Simon Njoroge (PW-2). A transfer was done on the same day in favour of the plaintiff and he was issued with a title deed to the land which measures 8.1 Ha. He stated that the acreage of the land parcels No. 761 and 764 add up to 21.0 Ha, which is the acreage of the original land parcel No. 90. He did however state that in the parcel file, there is a mutation form for the original parcel No. 90, subdividing the said land into five portions identified No. 761, 762, 763, 764 and 765. He had no other mutation form in his file showing that these parcels No. 762 and 763 were omitted. The mutation form in the file did not also show when it was received, for it had no Presentation Number. He was shown by counsel for the plaintiff, the mutation form held by the plaintiff which subdivided the land parcel No. 90 into the parcels No. 761 and 764, and he acknowledged that from the document, it appeared that it was received on 31 March 1994 under Presentation Book No. 689 and was registered on the same day. However, the then Land Registrar, Mr. Birundu, signed the mutation on 10 August 2009.

20. On the mutation form held by the defendant, he testified that the same appeared to subdivide the land parcel No. 90 into the land parcels No. 724 and 725. He noted that the mutation form, as it is, was blank on the date of registration, is missing a date, does not show when it was received, and did not have a presentation number. There was however an assessment for fees to be paid for two Green Cards, two titles, registration fees and consent. No receipt numbers are however indicated. He was not aware whether any Cards for the parcel Nos. 724 and 725 were ever opened as he did not have them. The Green Card he held showed that the parcel Nos. 724 and 725 were cancelled.

21. He did observe that the title deed held by the defendant to the parcel No. 725 was issued on 31 March 1994 but there appeared to have been an alteration on the date and month. The title deed did not also show which parent title it resulted from. On the title deed held by the plaintiff, he did not note any alterations but observed a discrepancy between the date of opening and the date of issuance of title. The title deed showed that it was issued on 30 March 1994 whereas the date of opening of the register showed 31 March 1994. He stated that it was not possible for a title deed to be issued before the register is opened and he thought that the date of 30 March 1994 was possibly a typographical error. He was of the view that the correct date was 31 March 1994 which was supported by the entry in the Green Card which showed that title deed was issued on 31 March 1994.

22. He found that the paper textures of the two title deeds held by the plaintiff and defendant were different, and although textures could vary, if issued on the same day, they should be of the same quality. The two title deeds also indicated different signatures of Land Registrars. He observed that the title deed of the plaintiff was signed by a Land Registrar by name of Mgenyi whereas the title deed of the defendant was signed by a Land Registrar name Birichi. They were both Land Registrars in Nyandarua at the time. He stated that if due care and diligence was followed, it was not possible to have issued two conflicting title deeds. He thought that considering the alterations in the title deed of the parcel No. 725, the title deed to the parcel No. 764 was the genuine one.

23. He observed that the RIM for the area notes that the parcel No. 90 was amended to create the parcels No. 761 and 764 and the amendment was done on 11 August 2009 in legend No.11. He noted that legend No. 10 is of the year 2005, and legend No. 12 is of the year 2006. He could not explain how legend No. 11 is a 2009 entry. He stated that the instruction to amend the RIM was from the mutation form that the plaintiff holds. Instructions to amend were issued on 8 August 2009 and the RIM amended on 11 August 2009. He did state that the plaintiff had written to their Head Office and the District Registry complaining that the Green Card to his parcel No. 764 was missing. The Chief Land Registrar wrote a letter dated 20 November 2006 asking the District Land Registrar to reconstruct the register. Another letter was also written by the Chief Land Registrar on 29 October 2007. The Green Cards were then reconstructed by

Mr. Birundu, then the Land Registrar, on 18 November 2008. No instructions were ever received on the reconstruction of the Green Cards to the parcel Nos. 724 and 725 and their Green Cards are not available.

24. In cross-examination, he stated that there was no gazettelement before the reconstruction of the Green Cards was done. He did note that there was an extract of a Green Card, held by the defendant, prepared on 24 May 2006 by Mr. Birundu, for the parcel No. 90, showing that the said land was subdivided into the parcels No. 724 and 725. He stated that the procedure for amending the RIM used to be that the mutation form is first registered then forwarded to the District Surveyor for amendment of the RIM. Payment would then be made and a receipt issued. The subdivision would then be registered and the RIM amended. He explained that this is the reason why there may be late amendments of the RIM, but despite this, the amendment would still be effected following what was existing.

25. He did reiterate that according to the RIM that the plaintiff holds, the amendment to create the parcel Nos. 761 and 764, was done on 11 August 2009. The RIM held by the defendant showed that the amendment to parcel No. 90 to create the parcels No. 724 and 725 was done on 13 July 2005. Both entries are No. 11 in their respective legends. He also did observe that the mutation form of the defendant was paid for on 17 November 1993. He did see an entry dated 9 July 1993, in the encumbrance section of the Green Card held by the defendant to parcel No. 90, which registered an order in respect of the case No. 186 of 1993 though the entry was not signed. There was also a caution noted as entry No. 5 which had never been lifted. He stated that he did not find the Presentation Book for the years 1993-1994. He also stated that the parcel file to the land parcel No. 764 did not contain the consents or transfer documents. He agreed that the title deed held by the plaintiff showed the date 30 March 1994 by which date the original parcel No. 90 had not yet been closed for subdivision. He testified that the instruction to amend the RIM so as to bring in parcels No. 761 and 764 came in the year 2009, but at that time, the parcel No. 90 had already been amended to bring forth the parcels No. 724 and 725. He noted that the defendant's mutation form was signed by Mr. Mgenyi, the then Nyandarua Land Registrar together with the Executive Officer of the Nyahururu Court, although it was not dated. He agreed that the defendant had the requisite documents needed to transfer land through a court decree. He observed that the mutation form held by the plaintiff showed 31 March 1994 as the date of registration, but it was signed by Mr. Birundu, Land Registrar, on 10 August 2009, and the amendment done the following day.

26. Re-examined, he stated that he did not have in his file the LCB consent of the defendant to subdivide and transfer the 4 acres to him. He could not explain how the defendant got his title deed as he did not have his documents, but likewise, he did not have documents in the parcel file to support the transfer from Mr. Munywe to the plaintiff. He did not think that the errors in the defendant's title deed were minor for mere correction and in his view a fresh title deed ought to have been prepared.

27. With the above evidence, the plaintiff closed his case.

(c) Evidence of the Defence

28. DW-1 was Alexander Njoroge Mwangi, the son of the deceased defendant. He did testify that he was aware that on 21 May 1987, his father entered into a sale agreement with Mr. Munywe to purchase 4 acres of land from the land parcel No. 90 at the price of Kshs. 12,000/= per acre. He stated that payment was made in full and a balance of Kshs. 3,000/= was paid into court. He stated that the 4 acres were shown to his father and that he took possession and built a house. The vendor however refused to transfer the land and the defendant filed the suit Nyahururu PMCC No. 186 of 1983. An order of injunction was passed on 17 June 1993. No defence was filed and the case was heard and judgment entered for his father. The decree was then effected. A mutation was done to excise the 4 acres and a subdivision of the land parcel No. 90 was done, which led to the creation of the land parcels NO. 724 and 725. He stated that the mutation was presented and paid for on 17 November 1993 and he produced the receipts thereof. He testified that an application for Land Control Board (LCB) consent was made on 17 November 1993 by the Executive Officer of the Nyahururu Court and consent was issued on 17 December 1993. A transfer was then prepared and signed by the Executive Officer and a title deed issued. He produced these documents as exhibits.

29. He testified that steps were then made to amend the RIM and the amendment was done on 12 July 2005. On 24 May 2006, his father applied for a copy of the Green Card which he got. It reflected that on 31 March 1994, the parcel No. 90 was closed to create the parcels No. 724 and 725. He testified that they have been in occupation of the disputed land since the year 1987 and that the land is well defined with a perimeter barbed wire fence and beacons. There is also a permanent house and mixed farming undertaken. He further testified that his late father had been charged in Nyahururu Criminal Case No. 2037 of 2005 and acquitted. He produced the proceedings and judgment of this case.

30. In cross-examination, he testified that he came to know that the plaintiff was also a purchaser to Mr. Munywe's land in the year 2005 during the criminal case that his father faced. He was not familiar with the circumstances that led to the signing of the agreement dated 14 October 1989 where it was agreed that some purchasers would be refunded. He stated that the 4 acres that his father sought in the case against Mr. Munywe, were specific, and that the same was where they have been living. He was questioned on an LCB consent whereby his father claimed a portion of 1.4 Ha which he accepted must have been his father's claim, although in the decree, where he had sued Mr. Munywe, he did obtain land measuring 1.62Ha which now became the land parcel No. 725. He agreed that the consent obtained by his father was issued on 17 December 1993 and bore the land parcel No. 725, which could not be the case because the Green Card was opened on 31 March 1994. He testified that when the 4 acres was carved out to execute the decree, neither the plaintiff nor Mr. Munywe were present. He stated that the documents were executed by the Executive Officer because Mr. Munywe declined to sign them. He did not agree that the 4 acres that his father had purchased were situated elsewhere in the larger farm.

31. DW- 2 was Joshua Nyabola, the surveyor who also testified for the plaintiff. The aim of recalling him for the defence was so that he could shed light on the RIM held by the defendant, which was prepared at the Nyeri Provincial Survey Office. He however explained that it was best that an officer from the said office testify on the document and he was therefore stood down without saying much.

32. DW-3 was Nathan Gioche Gathaiya, the Land Registrar, Nyandarua. He had also testified for the plaintiff, but the defendant also called him as his witness so that he could produce the extract of the Green Card held by the defendant over the parcel No. 90, which was signed on 24 May 2006, by Mr. Birundu, then the Land Registrar, Nyandarua. The same showed that the parcel No. 90 was subdivided into the parcels No. 724 and 725.

33. DW-4 was John Kinyanjui Ndururi, a survey assistant working with Arch Surveys, a private firm of surveyors. He is the one who subdivided the land parcel No. 90 into the land parcels No. 724 and 725. He stated that he did this in the year 1993 pursuant to a court order held by the defendant which directed that he be granted 4 acres out of the land parcel No. 90. The defendant also held an LCB consent. He testified that he went to the ground accompanied by the area chief and the defendant. The defendant showed him the portion within the land parcel No. 90 which he wished to have excised. There was a temporary house in this portion and the land was under agricultural use. He proceeded to carve out the 4 acres, the equivalent of 1.62 ha, and drew the mutation form which he signed. He then took it to court to be signed by the Executive Officer and then to the District Surveyor for new parcel numbers to be given. The 4 acres was given the parcel No. 725 and the remaining portion land parcel No. 724. He returned the form to the defendant to pursue registration.

34. In cross-examination, he testified that the court did not indicate where the 4 acres were to be excised from only that it was to be from the Plot No. 90 and that it is the defendant who pointed out the 4 acres to him. He did not involve the registered owner as he was acting pursuant to a court order. He testified that prior to his survey, there had not been any earlier survey which carved out 20 acres of the land. He testified that he did not carve out the 4 acres out of any portion of 20 acres. When he carved out the 4 acres, the letter dated 15 June 1993, which proposed subdivision of the land parcel No. 90 into 7 portions one which measured 1.4 Ha, was not shown to him by the defendant. What he was shown was the decree, which did not indicate where the 4 acres fell.

35. PW-5 was Stephen Githaiga Muturi, a Senior Cartographer working with the Provincial Survey Office in Nyeri. He testified that up to the year 2006, the Provincial Survey, Central Province was the

amendment centre for Nyandarua District. He identified the RIM held by the defendant as being the RIM for Mawingo Settlement Scheme, which was issued by the Nyeri Provincial Survey Office. He identified that the RIM was amended on 12 July 2005, through entry No. 11, to note that the parcel No. 90 was being subdivided into the parcel Nos. 724 and 725. The map was then issued on 13 July 2005.

36. In cross-examination, he testified that the RIM is the supporting document for issuance of title deeds although titles may be registered using the mutation form. The parcel No. 764 was not reflected in the RIM from the Provincial Survey Office. He acknowledged that the parcel No. 90 seems to have been subdivided twice, (into parcel Nos. 761/764, and parcel Nos. 724/725) which to him was mysterious. He testified that if there is an error, this is not corrected by removal of the entry in the map, but a new edition of the map is created showing the history of the events. He also observed that the entries in the plaintiff's RIM did not follow chronology as required. According to him, the parcels No. 724 and 725 should have come as earlier editions to the parcel Nos. 761 to 764. He could not however state which of the two RIMs should supercede the other although when I questioned him, he did state that it is the plaintiff's RIM which is in error as there is no explanation as to why the parcel Nos. 724 and 725 were removed. He actually acknowledged that they have therefore been operating with an erroneous map.

37. With the above evidence, the defendant closed his case.

(d) Submissions of Counsel

38. In his submissions, Mr. Kamanga assisted by Mr. Burugu, for the defendant, first submitted that the plaintiff's claim is time barred as it was his case that the defendant entered his land in the year 1989. He submitted that the plaintiff had 12 years within which to file suit to claim the land pursuant to Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya. He submitted that the plaintiff ought to have filed his action by the year 2001 and therefore the suit should be struck out. He relied on the case of **Haron Onyancha vs National Police Service Commission & Another (2017) eKLR** wherein a dictum in the case of **IGA vs Makerere University (1972) EA 65** was cited with approval, and the case of **Board of Governors Kisasi Secondary School vs Johnson Kitheka Kathenge (2017) eKLR**.

39. He submitted that although the plaintiff produced the letter of consent dated 20 August 1982, he did not produce the mutation form which identified the portion of land that he had purchased from Mr. Munywe. He submitted that in the absence of this, the only conclusion that can be drawn is that no survey was ever done by the plaintiff to excise the 20 acres of land. He also pointed out that the transfer form exhibited by the plaintiff was of 10 June 1982 and was for the entire parcel No. 90. He submitted that it was four years later when the plaintiff purchased the house that it was identified that the land would be on the Eastern side, and it was his view that this lack of proper identification of what the plaintiff purchased, is what lay the foundation for the problems currently encountered. He pointed out that there was no proof that the defendant was among the persons to be refunded owing to the land being smaller than contemplated. He submitted that the defendant successfully sued for 4 acres and obtained a decree which was executed in 1993 and brought forth the land parcels No. 724 and 725. He averred that from 31 March 1994, the land parcel No. 90 ceased to exist. He submitted that when instructions were given to amend the RIM to include the parcels No. 761 and 764, the RIM had already been amended in the year 2005 to bring in the parcel Nos. 724 and 725. He submitted that this second amendment was a fraud perpetuated by the plaintiff in collusion with officials in the District Survey Office at Nyandarua. He also questioned the manner in which the title Nos. 724 and 725 were cancelled out of the Green Card of the parcel No. 90. He was of the view that the title deed issued to the plaintiff was backdated to fit with the narrative that the title was properly obtained on the same date that the parcel No. 90 was closed. He contended that the plaintiff could not have had a title deed, as at the year 2005, because the Green Card dated 24 May 2006, only indicated the parcel Nos. 724 and 725. He did not think therefore that it can be declared that the parcel No. 725 is within the parcel No. 764. In the alternative, he submitted that the defendant has proved a case of adverse possession for the 4 acres.

40. For the plaintiff, Mr. Kariuki Mwangi, inter alia submitted that the portion where the plaintiff's 20 acres was to be sited was clearly indicated to be on the "eastern side where the house is located". He submitted that the defendant was among the purchasers who were to be refunded their money as the land

was not enough through the agreement dated 14 October 1989. He averred that the portions sold to the parties were distinct and that the plaintiff was the first purchaser of the portion comprising of 20 acres. He submitted that the plaintiff sued Mr. Munywe for the transfer of this portion through the case Nairobi RMCC NO. 633 of 1990 and a decree was issued on 5 April 1991 long before the defendant obtained his decree against Mr. Munywe on 3 September 1993. He submitted that on obtaining the decree, the plaintiff wrote a demand letter dated 12 April 1991, to the defendant, to vacate the house, which the defendant did, but proceeded to construct a semi permanent structure still within the 20 acres belonging to the plaintiff. He submitted that the plaintiff proceeded with subdivision to carve out the 20 acres and obtained a title deed on 31 March 1994. He made submissions justifying the title of the plaintiff and doubting the authenticity of the defendant's title. He did not think that the defendant has proved his claim for adverse possession, as in his view, time would start running in favour of the plaintiff from the time the plaintiff became registered as proprietor on 31 March 1994, but the case Naivasha RMCC No. 597 of 2005, which was withdrawn, interrupted time before the defendant could accumulate the 12 years required to sustain a claim for adverse possession, which would have been attained on 31 March 2006. He also submitted that the claim for adverse possession is unmaintainable as it was not filed through an Originating Summons and relied on the case of *Bwana vs Said & Others (1991) 2KAR 262*. He faulted the defendant for not enjoining the Land Registrar, if his argument was that the plaintiff colluded with the Land Registrar to obtain title. He pointed out that accusations of fraud should not be treated lightly and relied on several authorities to support this position.

(e) Analysis and Decision

41. I have considered the matter.

42. This is a sad case which has brought out the rot that is now prevalent in our land registries and which has hampered proper land administration in this country. It should not happen that two persons have title to the same parcel of land, which is exactly what has transpired in this case. But indeed, as is discernible from the evidence of the parties and the land officials who testified, even the integrity of Registry Index Maps is now in doubt. I have heard of missing documents in land parcel files, two titles being issued to two different people supposedly on the same date; missing public records such as Presentation Books and Registers; lackadaisical staff who don't seem to care about the heavy public trust imposed on them, and outright manipulation of land records. It is sad; nay, shocking, when you hear of these things, which should never happen. Land is sensitive, it is emotive, it is probably life itself, and it behoves upon those entrusted to administer this vital commodity, to undertake their work diligently and faithfully, and perform their tasks with utmost integrity and good faith. I will say more on this at a later stage, but I felt the need to vent a little, before I go to the gist of the matter and determine the issues that are at hand in this case.

43. The genesis of this dispute is that PW-2 sold his land parcel Nyandarua/Mawingo/90 (simply referred to as parcel No. 90) to several persons who included the plaintiff and defendant. This land was initially under the Settlement Fund Trustees (SFT) and the same was transferred to PW-2 on 11 May 1989 when PW-2 became its registered proprietor.

44. The plaintiff was desirous of purchasing 20 acres of this land whereas the defendant was desirous of purchasing 4 acres. It is not clear when exactly PW-2 entered into a sale agreement with the plaintiff for the purchase of 20 acres, although in the year 1982, a consent to carve out this 20 acres and have it transferred to the plaintiff, was given by the Land Control board (LCB). It is apparent that 20 acres would be sold to the plaintiff, but I do not think that the location of this 20 acres had been agreed as at 1982, or if it was, it did not encompass the area where the permanent house was situated. It does seem that at some point, the plaintiff got interested in also having the house that was on the suit land, and he therefore needed to pay for it, which he did in the year 1987. It is about this time that the area of 20 acres that the plaintiff was purchasing was more defined to be "on the Eastern side where the house is located" but again I do not think that the area was properly defined for there is no proposed subdivision plan or mutation form prepared at this time.

45. There were other purchasers of course, and it ended up being that PW-2 had sold more land than he

actually had. A meeting was called on 14 October 1989, and it was agreed, that the land parcel No. 90 will be divided only among those who had obtained Land Control Board (LCB) consents. Unfortunately, that agreement, which was produced as an exhibit by the plaintiff, does not state which persons had obtained LCB consents and which persons were to be refunded their money. In as much as the plaintiff argued that the defendant was supposed to be refunded his money, I have seen no evidence of this, not that it matters, because the defendant did obtain an order from court, that he be given 4 acres out of the land parcel No. 90. It is water under the bridge, and I cannot, owing to the *res judicata* rule, decide afresh whether or not the defendant deserved to get 4 acres of land from the land parcel No. 90. If any party thought that the decision to grant the defendant 4 acres of land was erroneous, the avenue was to appeal the judgment in Nyahururu Civil Suit No. 186 of 1993.

46. That said, I doubt if at the time that this agreement of 14 October 1989 was made, the purchasers had their entitlements defined on the ground. If that were the position, then all that the plaintiff needed to do was register a mutation form for his 20 acres, for already, LCB consent had been issued for this. But I get a feeling that the purchasers were not agreeable on the ground position of their parcels of land, and probably had other smaller nitty gritty things that they had not sorted out, and this is what led to the two civil suits filed by the plaintiff and the defendant against the seller of the land who is PW-2. If all were well, these two suits would certainly not have been filed.

47. The first of these suits was Nairobi SRMCC No. 633 of 1990, filed by the plaintiff seeking the transfer of the 20 acres that he had purchased. The final orders issued were as follows :-

(i) That the defendant do transfer to the plaintiff 20 acres out of the defendant's land title Plot No. 90 Mawingo Scheme.

(ii) That if the defendant fails, refuses or neglects to sign the mutation and transfer forms or other forms to effect the transfer, the executive officer of this Court shall execute mutation, transfer forms and other necessary documents to effect the transfer.

(iii) That the plaintiff do have the costs of this suit

48. The above order was made in January 1991 and formally extracted on 5 April 1991. The order is telling, that there was not, at that particular time, any mutation form executed by PW-2 to excise 20 acres to the plaintiff, for there was issued an order for the signing of a mutation form, meaning that the precise location of the 20 acres was an issue that was probably not completely settled by some or all the parties involved.

49. Following the decree, the plaintiff engaged a surveyor, a Mr. Muritu, who drew up a mutation form proposing to subdivide the land parcel No. 90 into the land parcels No. 761 and 764. The mutation form, which was produced as an exhibit by the plaintiff, is dated 16 March 1994 and it appears to have been registered on 31 March 1994. I am deliberately using the word "appears" because this date of registration is not verifiable, for the plaintiff did not produce the receipt for payment and the officers of the Ministry of Lands who testified, could not present the Presentation Book and the original mutation form was not available. In fact, PW-4, the Land Registrar, testified that the mutation form in the parcel file to Plot No. 90, contained a different mutation form, subdividing the original land into five plots, proposed to be registered as parcels No. 761, 762, 763, 764 and 765. This mutation form however did not have a Presentation Number and did indicate when it was received.

50. Coincidentally, at about the same time, the defendant and other purchasers were also pushing for what they believed they were entitled to. The Green Cards produced by the plaintiff and defendant differ on some aspects, but both do note that on 22 August 1989, one Samuel Njoroge Kinyanjui, lodged a caution claiming a purchaser's interest. This is entry No. 4 in the title abstract. The defendant lodged a similar caution on 5 June 1990. Whereas the caution in entry No. 4 was withdrawn on 16 February 1994, there is no record that the defendant's caution was ever lifted. (I will come back later to this aspect of the matter.) To assert his rights further, the defendant also filed the suit Nyahururu PMCC No. 186 of 1993 against PW-2 and he benefited from an order of injunction issued on 17 June 1993, which stopped PW-2 from

any further interference with the land pending hearing of the suit. The case was heard, ex-parte, as PW-2 did not file a defence, and judgment was entered against PW-2 in the following terms :-

(i) That the defendant do transfer 4 acres of land out of Plot No. 90 Mawingo Scheme failure to which the Executive Officer to sign the transfer forms in respect of the same plot to effect absolute transfer.

(ii) That this will nonetheless be done only after Kshs. 3,000/= balance is paid by applicant for the defendant to collect.

(iii) That the defendant is condemned to pay costs and interest to the plaintiff.

51. The defendant quickly moved to execute this judgment through the Executive Officer of the court. He obtained the consent of the LCB on 17 December 1993. He also engaged a surveyor who drew a mutation form on 11 November 1993. The mutation form was signed by the Executive Officer on 17 November 1993 and paid for on the same day. The defendant did produce the original payment receipts as exhibits to demonstrate this. It is however not clear whether this mutation form was ever registered, for what was produced, did not have a Presentation Book number nor a date of registration. It is this mutation form which proposed to subdivide the land parcel No. 90 into the land parcels No. 724 and 725.

52. At this juncture, it will be observed that there were two mutation forms, one drawn by the plaintiff proposing to subdivide the land parcel No. 90 into the land parcels No. 761 and 764, the latter to be the plaintiff's 20 acres, and the other mutation form drawn by the defendant, proposing to subdivide the land parcel No. 90 into the land parcels No. 724 and 725, the latter being his 4 acre share.

53. What happened after that is in serious contention. According to the plaintiff, his mutation form was registered on 31 March 1994 and he was immediately issued with a title deed to the parcel No. 764 on the same day. His title deed however reads that it was issued on 30 March 1994 which is the day before. According to the defendant, the land parcel No. 90 was subdivided, following his version of the mutation form, and the titles No. 724 and 725 ensued. His case is that he was also issued with a title deed on 31 March 1994. These two scenarios cannot co-exist, and it is my impression that one party may have backdated their title deed to match what was in the register. But who? The answer to this question should reveal itself from the abstract of the title, or the Green Card to the parcel No. 90, but again, we have two different Green Cards and we have to work out which between the two, appears, on a balance of probabilities, to be the more authentic one.

54. None of the parties produced a Green Card prepared in the 1990s. The earliest Green Card is the certified copy produced by the defendant which was extracted on 24 May 2006 and signed by Mr. C.O. Birundu, the then Land Registrar. Entry No. 8 is dated 31 March 1994, and it shows that the title to the land parcel No. 90 was closed on subdivision to produce the land parcels No. 724 and 725. The plaintiff however had a Green Card which crosses out the subdivision creating the parcels No. 724 and 725, and in place thereof, inserts the land parcels No. 761, 762, 763, 764, and 765 as being the subdivisions of the land parcel No. 90. This cancellation was never countersigned and no date entered to show when the cancellation was done. If indeed what was entered on 31 March 1994, were the parcels No. 761 to 765, as noted in the Green Card produced by the plaintiff, the defendant's Green Card extracted in the year 2006, could have reflected this. But what it shows is different; that the parcel No. 90 was subdivided into the land parcels No. 724 and 725. The plaintiff's own case is that the land parcel No. 90 was only subdivided into the parcels No. 761 and 764, meaning that the entries showing parcels No. 762, 763 and 765, are wholly fictitious.

55. I am not convinced that the plaintiff could have tendered his mutation form on 31 March 1994, have it registered on the same day, and again on the same day, obtain a title deed, forget for a moment that the title deed that he has bears the date 30 March 1994. The pace of the defendant's title seems more plausible. He paid for the mutation on 17 November 1993, and you would expect, that title would ensue a little later, which happened on 31 March 1994.

56. In addition to the above, I do not see how the plaintiff could have obtained a title deed in his favour on 30 or 31 March 1994, for there was a restriction on the land. This restriction was never lifted and could only be utilized in favour of the person who had placed it, who is the defendant.

57. I am not persuaded that the two title deeds held by the plaintiff and defendant were both issued on 31 March 1994. In fact, it did come out that their textures were different, and one would expect the paper used on the same day to be the same. One title deed was prepared later and backdated, and I am persuaded, on a balance of probabilities, that it is the title deed of the plaintiff which was backdated and not that of the defendant. I am also persuaded that the entries showing that the land parcel No. 90 was subdivided into the land parcels No. 761, 762, 763, 764 and 765, were not made on 31 March 1994, they were made later, and that is why there is the cancellation of the land parcels No. 724 and 725, in that entry. That entry was made after 24 May 2006 and not earlier. It will be recalled that around this time, the plaintiff had complained of missing Green Cards in the Land Registry and he did write letters to the Chief Land Registrar. The letter that he wrote to the Chief Land Registrar was never produced as an exhibit and I cannot tell what exactly the complaint was about. What I have is a letter from the Chief Land Registrar, dated 20 November 2006 and 29 October 2007, instructing the District Land Registrar, Nyandarua, to reconstruct "all the relevant Land Registers (Green Card)". I am not in doubt, that it is after these letters from the Chief Land Registrar, that the District Land Registrar, proceeded to do exactly what the plaintiff had wanted, and that is, demonstrate that the land parcel No. 90 has been subdivided into the parcels No. 761 and 764 (or the parcels No. 761 to 765 inclusive) which was duly done and that is when the Green Cards were prepared to reflect this position.

58. I am persuaded that there was no "reconstruction", but rather, a "construction" of the Green Cards to the parcels No. 761 and 764, for they did not exist there before to be reconstructed. I am fortified in reaching this conclusion, because I have no evidence to the contrary, that these Green Cards existed at any one time prior to this period, and it is indeed admitted by the plaintiff, that his title documents were missing and he pursued their "reconstruction". Although these "reconstructed" Green Cards show the date of issue as 31 March 1994, this is not the case. I believe this "construction" took place in the year 2008, for I have seen a signature dated 18 November 2008, in the Green Card to the parcel No. 761, which signature purports to authenticate a subdivision of that title done on 19 July 1994. You clearly cannot have a signature for 2008 for a disposal that took place in the year 1994. The Land Registrar, in his evidence in chief, indeed confirmed that the Green Cards that are in his file, for the parcels No. 90, 761 and 764 are not the original Green Cards, but "reconstructed" Green Cards and he did confirm that the date of reconstruction was 18 November 2008. He also affirmed that the person who signed these Green Cards was Mr. Birundu, who was not the Land Registrar in Nyandarua in the 1990s, the Land Registrars then being Mr. Mgenyi and Mr. Birichi. This "construction" inevitably involved making the Green Cards to the parcel Nos. 724 and 725 disappear. That is why there is no record of them in the Nyandarua Land Registry, despite the record of 31 March 1994, showing that these titles were opened.

59. This "construction" could not have been complete without authenticating the titles in the Registry Index Map (RIM). It will be recalled that we have two RIMs, one relied upon by the plaintiff, prepared at the Nyandarua Land Registry, and the other relied upon by the defendant which was prepared at the Provincial Survey Office in Nyeri. Best practice would dictate that once a mutation is registered, the RIM is then amended before the title abstracts are prepared and title deeds issued. However, this does not appear to have been the practice in the Nyandarua Land Registry. The land officials who testified did state that at times, titles were issued based on a mutation which had not been reflected in the RIM, which is exactly what happened in this case.

60. I mentioned that we have two RIMs which should never happen. There can only be one authentic RIM. Between the two RIMs, one is certainly not a proper RIM. Just as I asked myself which was the authentic Green Card, I ask myself the same question with regard to the RIMs. I will examine the two RIMs and opt to start with that presented by the defendant. Before I embark on this task, it is important to remember that prior to the year 2006, the RIMs in respect to Nyandarua District were being prepared and amended at the Nyeri Provincial Survey Office and not at the District level. It is after 2006, that the amendment of RIMs was delegated to the District level. It was also explained that every time there is a resurvey, say due to subdivision, the map is amended and entered chronologically. Indeed, entries in the

editions can only be chronological, and sequential. Therefore, if say, on 2nd January 2017, there is entry No. 5, you would expect that entry No. 6 will come after this day, not before. The map is supposed to be a permanent record, only showing subsequent amendments and should not be tampered with by being backdated.

61. The RIM relied upon by the defendant as reflecting the title to his land parcel No. 725 was prepared at the Nyeri Provincial Survey Office. The evidence tabled reflects that this RIM, which is Sheet No. 2 in respect of Mawingo Settlement Scheme where the suit land is situated, was amended on 12 July 2005 in edition (or entry) No. 11. This entry reflected the subdivision of the land parcel No. 90, into the land parcels No. 724 and 725. All entries in this map are sequential with the last entry being this subdivision of the parcel No. 90 into the parcels No. 724 and 725. This map does not reflect that the parcel No. 90 was ever subdivided into the parcels No. 761 and 764.

62. The other map, relied upon by the plaintiff, was prepared in the year 2009. It was prepared at the Nyandarua District Survey office. Entry No. 11, reflects that on 11 August 2009, the parcel No. 90 was subdivided to produce the parcels No. 761 and 764. The next entry, No. 12, is not chronological. It is dated 21 March 2006 which is earlier in time. There are also other entries which bear dates that are before 11 August 2009 but which come later in the legend, and not before since they were earlier in time, as is supposed to be the case. The Surveyor who testified for the plaintiff, in cross-examination, stated that it appears that the entry which created the parcel No. 724 and 725 was erased, and in place thereof, was inserted the entry for 11 August 2009, to create parcels No. 761 and 764. That, I am convinced, is precisely what happened. A completely new map, not following the map that was inherited from the Provincial Survey Office, was created in order to fit the plaintiff's position. What could not change was that the parcel No. 90 was subdivided under entry No. 11, and the cartographer, knowing that he was cornered on this, or taking advantage of that position, opted to insert a different subdivision when drawing the map. He retained the entry No. 11, but this time, proceeded to show that the land parcel No. 90 was subdivided into the parcels No. 761 and 764, contrary to what the map that was inherited from the Nyeri Provincial Survey office indicated i.e that parcel No.90 has been subdivided into parcels No.724 and 725. The insertion is obvious, because the same, is not chronological to the following editions. It is backdated and this is glaring. It is clear beyond peradventure, that this is a manufactured map, solely aimed at accommodating the plaintiff.

63. It is distressing that this false map is now the map that is followed at the Nyandarua District Land Registry, and not the map inherited from the Provincial Survey Office. There are now subsequent subdivisions flowing from this, not only of the parcels No. 761/764, but also of other parcels completely unrelated to the parcels of land in this case. A related entry is that showing a further subdivision of the land parcel No. 761 owned by Pw-2. This land has now been subdivided into the land parcel numbers 882 and 883. From the Green Card of the parcel No. 882, it is evident that this has further been subdivided into the parcels No. 4593 to 4596. It is unfortunate, because these amendments are as a result of an incorrect previous amendment and are as a result of a title that ought not to have existed in the first place. I will need to figure out what to do about this, but for the moment, let me say that I have no doubt in my mind that the correct entry for edition No. 11 is the subdivision of the land parcel No. 90 into the land parcels No. 724 and 725. The alleged subdivision in entry No. 11 in the map now used by the Nyandarua Land Registrar, is a false and fraudulent entry which should never have been made.

64. From my discourse above, it is clear that I am not persuaded that the plaintiff's purported title to the land parcel Nyandarua/Mawingo/764 is a good title. Indeed, I come to the conclusion that it is a false and fraudulent title, prepared by the Land Registry under the pressure of the plaintiff. What is the correct and proper title is the land parcel Nyandarua/Mawingo/725 which is registered in the name of the defendant. The plaintiff tried to show that the title deed is not authentic because it has some alterations. 65. I have looked at the alterations, which comprise of erased typed entries. I agree, that a good title deed ought not to have such erasures, but apart from that, I have nothing to fault the title of the defendant, and to me, the mere fact that there are erasures, without anything more, is not enough to make me revoke his title. The plaintiff's quest to protect the title to the land parcel Nyandarua/Mawingo/764 therefore fails. Instead, it is my declaration that the parcel No. 725 is a good title which ought to be protected. Therefore the imposition of the alleged land parcel No. 764 onto the parcel No. 725 is illegal. The owner of parcel No.

725 ought to be left to enjoy this land , to the exclusion of all others, and to utilize it as he/she and/or his successors may wish and this title ought to be accorded the full protection of the law.

66. Having held that the defendant has a good title to the parcel No. 725 and entitled to enjoy it, it is completely unnecessary to consider the alternative prayer for adverse possession. However, if I were to consider this prayer, the defendant would have failed, for the reason that I am not convinced that he had a good case based on the doctrine of adverse possession. For one to be held properly to have acquired title through adverse possession, such possession, must be for a continuous, uninterrupted duration of at least 12 years and such possession must be peaceful, open and notorious, and without force. Interruption does not always have to be physical; a court case does constitute interruption (See the case of *Joseph Mwangi Theuri & 37 Others vs David Gitonga Mureithi, Nakuru ELC No. 238 of 2014, (2016) eKLR*). The defendant faced a criminal charge in the year 2005. That criminal charge, which was more or less for trespass, in my view constituted an interruption and time would start running afresh after the conclusion of the case on 24 January 2007. From that period to the time that the counterclaim was filed, which was the year 2010, is not a period of 12 years. I would not however had dismissed the claim for adverse possession for the reason only that it was not commenced by way of Originating Summons as argued by Mr. Kariuki. In as much as the law requires that a claim for adverse possession be commenced by way of Originating Summons, the case for adverse possession in this instance is by way of counterclaim and in such instance, it is not necessary to file a separate suit by way of Originating Summons. Even if it were a separate suit not commenced by way of Originating Summons, the court would have had discretion, by utility of the provisions of Article 159 (2) (d) of the Constitution, to waive the irregularity depending on the surrounding circumstances of the case and admit the claim despite the wrong procedure employed.

67. My holding therefore is that the defendant succeeds on his original claim that he is the legitimate owner of the land parcel Nyandarua/Mawingo/725 and that this land exists on the ground as comprised of 4 acres. It is the purported land parcel Nyandarua/Mawingo/764, an illegitimate title, which has encroached into this proper land. The judgment herein should in all respects resolve the issues in ELC No. 138 of 2017. There is nothing that can bar the burial of the deceased defendant on land that he owned.

68. I have made a finding on the substance of the case. However, it will be observed that I have unearthed a lot of things touching on the titles issued in this case. I rebuke in the strongest terms possible, the conduct of the land surveyors and land registrars who held fort in Nyandarua District when the plaintiff's title was prepared and the RIM was amended to accommodate the plaintiff. I need to emphasize that land officers hold a position of trust. Title abstracts and RIMs are sacred land documents. They are the pillars upon which our land administration system is founded. They are documents that should never, ever, be interfered with unless in accordance with the law. Supportive documents regarding dispositions also need to be well kept, maintained, and Protected. It is a shame that Registers and Presentation Books can be torn and become illegible and it is necessary that good storage systems need to be established for these vital documents. Records of dispositions, including transfers, mutations, charges, etc, must be properly kept in land parcel files, and they need to stay there. It is time we stopped hearing that these records are missing and indeed they cannot walk out of files on their own, if it is not for gullible land officers for hire. Land officers need to properly undertake their work. It is a duty that they owe Kenyans. Where there is doubt, or dispute, the same should be resolved in a court of law, not by Land Registrars unilaterally making insertions in the Land Registrars in favour of one party. In this instance the land officers abdicated their duty with impunity and they have now led to utmost confusion with regard to the titles held in Mawingo Scheme that have their origin in the impugned titles No.761 and 764. I need to make corrective measures. The integrity of the register and the Registry Index Map needs to be restored. I know that some persons will be affected, but I am unable to hold myself back. I would advise them to see how they can be assisted administratively, and see how they can fit themselves in the orders that I now make.

69. I have found that entry No. 11 in the legend of the map held in the Nyandarua Land Office is an illegal entry. I direct the District Land Surveyor and the District Land Registrar to immediately restore the original legend No. 11 which should reflect the entries made in the map that was prepared at the Nyeri Provincial Survey Office. There is no problem with the entries No. 12 to 19. However, entry No. 20 in the legend which is a subdivision of the land parcel No. 761 must be affected, for there is in reality no parcel No. 761. The correct land parcel which flows from the correct legend No. 11 are parcels No. 724 and 725.

The parcel No. 725 is owned by the defendant and it remains. What is now left is parcel No. 724 in the name of Mr. Munywe (PW-2. Mr. Munywe subdivided his land to create the land parcels No. 881 to 883. The parcel No. 882 was subdivided to create the land parcels No. 4593, 4594 and 4595. These parcels on the ground should remain unaffected and I see no reason to cancel these titles. However, the survey map needs to indicate that they flow from the land parcel No. 724 and not the land parcel No. 761. The Land Registrar, Nyandarua, and the District Surveyor, Nyandarua, should move to make amendments to accommodate this order and also undertake all other necessary administrative procedures to ensure that this order is fully complied with.

70. The land that will be affected on the ground is the alleged land parcel No. 764 owned by the plaintiff. The title to this land should be cancelled for the reason that I have found that it is a fictitious title. What the plaintiff occupies on the ground is less 4 acres of what is noted in the title to the parcel No. 764. He should now be issued with a fresh title comprising of 16 acres or thereabouts. What is important, is that in mapping out his land, the other titles, i.e those comprised in the land parcels No. 725, 881, 882, 883, 4593, 4594 and 4595, should not be affected in any way. It should also be noted that the plaintiff's land is a subdivision of the land parcel No. 724 and not the land parcel No. 90. The plaintiff should be issued with a new title, with a new number, comprising of the remainder, after taking into account the land parcels No. 725, 881, 882, 883, 4593, 4594 and 4595.

71. I am aware, that the plaintiff will suffer a shortfall of 4 acres or so, yet he had a decree for it pursuant to the case Nairobi SRMCC No. 633 of 1990. It is up to him to find a way of obtaining 4 acres of land from Mr. Munywe; if he cannot, then the legal position will be that he holds a decree for the 20 acres, but he will have failed to execute for it. In my view, there has never been a proper execution of the decree for the 20 acres that he obtained in the said case, as I have held that the purported execution to create the parcel No. 761 and 764, was fraudulent and therefore null and void. The plaintiff is therefore taken back to the position that he was in the year 1993; he holds a decree for 20 acres, but has so far only got 16 acres. How he will move to get the other 4 acres is going to be between himself and Mr. Munywe and should not affect the defendant, who in my opinion, properly executed his decree and carved out 4 acres of land as noted in the decree. His title, to the land parcel No. 725, as I have held, is a good title and must be protected.

72. On costs, the same must go to the defendant for both the main suit and the counterclaim.

73. I now make the following final orders :-

(i) A declaration is hereby issued that the proper subdivision of the land parcel Nyandarua/Mawingo/90 is the division of the said land into the land parcels Nyandarua/Mawingo/724 and 725.

(ii) A declaration is hereby issued that the purported subdivision of the land parcel Nyandarua/Mawingo/90 into the land parcels Nyandarua/Mawingo/761 and 764 was fraudulent and null and void.

(iii) A declaration is hereby issued that the defendant is the proper and legitimate proprietor of the land parcel Nyandarua/Mawingo/725 measuring 4 acres or thereabouts and the said land can be utilized by the estate of the defendant in the manner that they deem fit subject only to any limitations imposed by law.

(iv) A permanent injunction is hereby issued restraining the plaintiff from any interference with the defendant's land parcel Nyandarua/Mawingo/725.

(v) The District Land Surveyor and District Land Registrar, Nyandarua, are hereby ordered to effect amendments to the map of Mawingo Settlement Scheme Sheet No. 2 so as to provide for the land parcels Nyandarua/Mawingo/ 724 and 725, and further effect amendments to the maps and other appropriate registers to demonstrate that the land parcels Nyandarua/Mawingo/761 and 764 do not exist and that the proper land parcels arising from a subdivision of the land parcel

Nyandarua/Mawingo/90 are the land parcels Nyandarua/Mawingo/724 and Nyandarua/Mawingo/725.

(vi) The District Land Registrar and District Land Surveyor, Nyandarua, are hereby ordered to effect all other amendments and administrative changes and directions, so that it is shown that the land parcels Nyandarua/Mawingo/882 and 883, and the remainder which should comprise of the plaintiff's land, about 16 acres or thereabout, flow from the land parcel Nyandarua/Mawingo/724, and further effect the necessary amendments and administrative changes to the land parcels Nyandarua/Mawingo/4593, 4694 and 4595.

(vii) That the plaintiff's title to the land parcel Nyandarua/Mawingo/764 is hereby cancelled, and in place thereof, the plaintiff to be issued with a new title, with a new number, for the remainder, which should be 16 acres or thereabouts, but to be ascertained on the ground, and which should demonstrate that it is carved out of the land parcel Nyandarua/Mawingo/724.

(viii) The costs of the suit and of the counterclaim will be to the defendant.

74. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 20th day of September 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Mr. Kariuki Mwangi instructed by M/s Kariuki Mwangi & Company Advocates, for the plaintiff.

Mr. Tombe holding brief for Mr. Kamanga instructed by M/s Njuguna Kamanga & Company Advocates, for the defendant.

Court Assistant: Toroitich.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU